IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 21, 2008

STATE OF TENNESSEE v. NATHANIEL SHELBOURNE, JR.

Appeal from the Criminal Court for Davidson County
No. 2001-B-1279 Steve Dozier, Judge

No. M2007-01844-CCA-R3-CD - Filed October 21, 2008

Appellant, Nathaniel Shelbourne, Jr., pled guilty in Davidson County to two counts of especially aggravated robbery. As a result, the trial court sentenced him to eighteen years on Count 1 and seventeen years on Count 3, to be served consecutively. Appellant appeals his sentence, arguing that the trial court erred by imposing consecutive sentences and that the application of consecutive sentencing violates *Blakely v. Washington*, 542 U.S. 296 (2004). We determine that the trial court was justified in ordering Appellant to serve the sentences consecutively where the record supports the trial court's holding that Appellant was a dangerous offender whose behavior indicated little or no regard for human life and had no hesitation about committing a crime in which the risk to human life was high. Further, both the Tennessee Supreme Court and this Court have already determined that *Blakely* did not impact consecutive sentencing in this state. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Emma Rae Tennent, Assistant Public Defender, on appeal, and J. Michael Engle, Assistant Public Defender, at hearing, for appellant, Nathaniel Shelbourne.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Appellant was indicted by the Davidson County Grand Jury in June of 2001 in a multi-count indictment for two counts of especially aggravated robbery (Counts 1 and 3), one count of aggravated assault (Count 2), two counts of attempted especially aggravated robbery (Counts 4 and 6), two counts of attempted first degree murder (Counts 5 and 8), one count each of aggravated robbery (Count 7), reckless endangerment (Count 9), evading arrest (Count 10), and possession of a controlled substance (Count 11).

Prior to trial, the trial court ordered Appellant to be judicially committed. Appellant was admitted to the Middle Tennessee Mental Health Institute for "competency training." He remained there from March of 2003 to January of 2007, until Appellant was deemed competent to stand trial.

On May 11, 2007, Appellant pled guilty to two counts of especially aggravated robbery, representing Counts 1 and 3 of the indictment. In exchange for his guilty plea, the State agreed to dismiss the remaining charges against Appellant. At the sentencing hearing and during the plea acceptance hearing, the following factual basis for the indictment was developed through witness testimony, the presentence report and statements of the prosecutor.

On March 5, 2001, Appellant offered two high-school age girls a ride from school to a store. One of the victims, Tori Babb, knew Appellant because they had attended the same school. During the ride, Appellant pulled a gun on Ms. Babb and demanded money. Appellant pointed the gun at her head and pulled the trigger. Appellant loaded the gun and again pointed it at Ms. Babb's head. Ms. Babb gave Appellant her wallet because she was afraid of being shot in the head. The wallet contained the identification cards of both victims as well as their bus passes. The two girls were able to jump from the car and flee to safety. This incident gave rise to Count 1 of the indictment. Count 2 of the indictment, for aggravated assault, related to the second girl. It was dismissed as part of the plea agreement.

Later that same day, Appellant drove to a Citgo convenience store and demanded money from the clerk, Rae Leigh Miller.[1] When Ms. Miller stepped back from the register, Appellant shot her in the face. Appellant grabbed the cash drawer of another register in the store and fled. A witness, Deboyan Flint, heard a pop and saw Appellant leaving the store carrying the cash drawer. Mr. Flint supplied an "extremely" detailed description of Appellant and his getaway car. This incident gave rise to Count 6 of the indictment.

[1] At the time of the sentencing hearing, Ms. Miller was known by Rae Leigh Smith. We will refer to her as Ms. Miller, her name at the time of the indictment.

About an hour after the robbery at the Citgo, Appellant purchased a cell phone for $100 at a Mapco store. This incident was captured on videotape. Appellant then had a stereo installed in his car at Sounds Stereo. The employees at Sounds Stereo reported that there was a cash drawer on the front seat of the car while the stereo was being installed.

At 6:10 p.m., Appellant entered a Texaco and asked the clerk, Michael David George Hogan for some cigars. When the clerk responded that they did not have any cigars, Appellant pulled out his gun and demanded money. Mr. Hogan was unable to open the cash drawer, so Appellant shot him in the face. When the victim fell to the floor, Appellant took twenty dollars from the victim's right front pants pocket and left the store. Witnesses saw Appellant leave the scene in a car that matched the description of the car used in the Citgo robbery earlier that day. This incident gave rise to Count 3 of the indictment.

Police later apprehended Appellant in the car that contained a cash drawer, a 9 mm Beretta handgun, receipts from recent purchases and two shirts.

Appellant admitted to shooting Mr. Hogan but denied robbing the Citgo store. Appellant tried to explain that the cash drawer belonged to the "numbers man" that he robbed. The number on the cash drawer matched that of the cash drawer that had been stolen from the Citgo store. Eyewitnesses identified Appellant as the perpetrator.

Appellant gave a statement in which he claimed that he needed money for drugs, the dentist, and the audio car shop so he stole a gun and "went to rob one gas [s]tation [and] ended up robbing two not having in mind shooting anyone." The arresting officer stated that Appellant did not display any behavior that was consistent with mental illness.

At the sentencing hearing, the presentence report was introduced into evidence. It indicated that Appellant had two prior convictions for assault and one for theft under $10,000. The trial court also heard testimony of the manager of the Citgo, who discovered Ms. Miller lying in a pool of blood. Ms. Miller herself testified that her life was "ruined" by Appellant's actions. She was hospitalized for three months and suffered a stroke during an operation. Her right arm is now paralyzed and she wears a brace on one of her feet. Ms. Miller had to undergo therapy to relearn how to walk and talk. She suffered a brain injury, and her thought process is now somewhat slow. Since the accident, she lost custody of her children because she is unable to care for them.

Appellant introduced evidence of his mental health history, including his diagnosis with schizophrenia, paranoia type, and polysubstance dependence which is in remission under a controlled environment. Appellant's mother also testified regarding his behavior and mental problems.

At the conclusion of the sentencing hearing, the trial court determined that the following enhancement factors applied: (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (8) the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into

the community; and (10) the defendant had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(1), (8), (10). The trial court applied these enhancement factors on the basis of Appellant's "extensive illegal drug usage and a felony conviction in addition to two misdemeanor convictions." The trial court also felt that the videotaped evidence of one of the victim's injuries showed Appellant's additional criminal behavior. Further, the trial court noted that Appellant had a prior revocation of probation and, at the time of the offense, there was another person in addition to the victim that was present. The trial court placed "great weight" on the enhancing factors. The trial court found that one mitigating factor applied: (8) the defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense. T.C.A. § 40-35-115(8). However, the trial court placed minimal weight on this factor.

Further, the trial court found "by a preponderance of the evidence [Appellant was] a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." T.C.A. § 40-35-115(b). As a result, the trial court sentenced Appellant to an eighteen-year sentence in Count 1 and a seventeen-year sentence in Count 3, to be served consecutively. The trial court concluded that the "stated sentences are necessary based on the seriousness of the offense, deterrence of this defendant, and the need to protect society from this dangerous offender."

Appellant filed a timely notice of appeal.

Analysis

On appeal, Appellant argues that the trial court erred in imposing consecutive sentences. Specifically, Appellant contends that the trial court did not make the requisite specific findings under *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995), that would allow consecutive sentencing as a dangerous offender. 905 S.W.2d at 938. Further, Appellant argues that the sentence is "greater than that deserved." Finally, Appellant submits that the application of consecutive sentencing violates *Gomez v. State*, 239 S.W.3d 733 (Tenn. 2007), and *Blakely v. Washington*, 542 U.S. 296 (2004). The State disagrees.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823

S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

We begin our analysis with a brief discussion of recent changes in Tennessee's sentencing statutes. In response to the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee General Assembly amended Tennessee Code Annotated section 40-35-210. *Compare* T.C.A. § 40-35-210(c) (2003) *with* T.C.A. § 40-35-210(c) (2006); *see also* 2005 Tenn. Pub. Act ch. 353, § 18. This amendment became effective on June 7, 2005. The General Assembly also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Acts ch. 353, § 18. In addition, the legislation provides that a criminal defendant who committed a criminal offense on or after July 1, 1982, but is not sentenced until after June 7, 2005, may elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id.* In the case sub judice, Appellant committed his offense prior to June 7, 2005, and did not sign a waiver, therefore, the new act does not apply in our review of his sentencing.

First of all, we note that the United States Supreme Court's decisions in *Blakely* and *Cunningham v. California*, 549 U.S. 270 (2007), do not affect our review of consecutive sentencing issues. Our supreme court has specifically noted that *Blakely* does not impact our consecutive sentencing scheme. *State v. Anthony Allen*, ___ S.W.3d ___, No. W2006-01080- SC-R11-CD, 2008 WL 2497001, at *18 (Tenn. Jun. 25, 2008); *State v. Robinson*, 146 S.W.3d 469, 499 n.14 (Tenn. 2004). In addition, this Court has also consistently found that *Blakely* does not affect consecutive sentencing determinations. *See, e.g., State v. Jeffrey Ray McMahan*, No. E2007-00037-CCA-R3-CD, 2008 WL 465273, at *3 (Tenn. Crim. App., at Knoxville, Feb. 21, 2008); *State v. John Britt*, No. W2006-01210-CCA-R3-CD, 2007 WL 4355480, at *13 (Tenn. Crim. App., at Jackson, Dec. 12, 2007), *perm. app. denied* (Tenn. Apr. 28, 2008); *State v. Earice Roberts*, No. W2003-02668-CCA-R3-CD, 2004 WL 2715316, at *12 (Tenn. Crim. App., at Jackson, Nov. 23, 2004), *perm. app. denied* (Tenn. Mar. 21, 2005); *State v. Lawrence Warren Pierce*, No. M2003-01924-CCA-R3-CD, 2004 WL 2533794, at *13 (Tenn. Crim. App., at Nashville, Nov. 9, 2004), *perm. app. denied* (Tenn. Feb. 28, 2005).

We now turn to Appellant's issue that the imposition of consecutive sentencing is not warranted in this case. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds, among other criteria, that:

> (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b). When imposing a consecutive sentence, a trial court should also consider general sentencing principles, which include whether or not the length of a sentence is justly deserved in relation to the seriousness of the offense. *See State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The imposition of consecutive sentencing is in the discretion of the trial court. *See State v. Adams*, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997).

Appellant pled guilty to two counts of especially aggravated robbery, a Class A felony. The trial court sentenced Appellant to eighteen years for Count 1 and seventeen years for Count 3 as a Standard Range I offender. The range for Appellant's sentences was fifteen to twenty-five years. T.C.A. § 40-35-111(2)(a)(1). Appellant's sentences were near the minimum of the range and by statute were ordered to be served at 100% as a violent offender. *See* T.C.A. § 40-35-501(i)(1) & (2). The especially aggravated robbery sentences were also ordered to be served consecutively to each other. Therefore, Appellant's effective sentence was thirty-five years.

If the trial court rests its determination of consecutive sentencing on the basis of a defendant's status as a "dangerous offender," the court must make two additional findings, as required by *Wilkerson*, 905 S.W.2d at 938. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). First, the trial court must find that an extended sentence is necessary to protect the public from further criminal conduct by the defendant, and, second, it must find consecutive sentencing to be reasonably-related to the severity of the offenses. *Wilkerson*, 905 S.W.2d at 939. The trial court herein considered the applicable statutes and case law, including the required *Wilkerson* factors, prior to making the following findings:

> The Court finds by a preponderance of the evidence this defendant to be a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high. T.C.A. § 40-35-115. The Court considers the defendant a dangerous offender and is of the opinion that an aggregate term of incarceration is necessary to protect the public, including the victim, from further serious criminal conduct. *See State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995). Therefore, the Court orders the sentences in this case to be served consecutively . . . .

While the trial court recited the *Wilkerson* requirements, we note that the trial court did not actually relate the required *Wilkerson* findings to Appellant on the record before sentencing Appellant to consecutive sentences as a dangerous offender. However, this Court may uphold consecutive sentencing if we are able to make the *Wilkerson* determinations from the record on appeal. *See State v. James A. Mellon*, No. E2006-00791-CCA-R3-CD, 2007 WL 1319370, at *10 (Tenn. Crim. App., at Knoxville, May 7, 2007), *perm. app. denied* (Tenn. Sept. 24, 2007); *State v. Daronopolis R. Sweatt*, No. M1999-2522-CCA-R3-CD, 2000 WL 1649502, at *9-10 (Tenn. Crim. App., at Jackson, Nov. 3, 2000). Appellant held his first victims hostage in a car and had no hesitation about pointing a loaded gun at one's head and pulling the trigger. Appellant then went on to commit multiple robberies. He shot two people at close range, and used the proceeds of the robberies to buy a stereo and a cell phone. These actions indicate a conscious disregard for human life and clearly establish that Appellant poses a serious threat to the general public which needs to be protected from further criminal conduct by Appellant. Appellant's actions were despicable and horrifying, not only to the people involved but arguably to the community at large. Thus, consecutive sentencing is necessary to protect the public from further criminal conduct by Appellant. Further, consecutive sentences are reasonably related to the severity of the offenses. Appellant "ruined" one of his victims' lives when he shot her in the head. She had a stroke, lost custody of her children, and had to relearn how to walk. *Id.* Under these circumstances, we find that the imposition of consecutive sentencing was appropriate. Consequently, this issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE